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(Consolidated with Nos. 80-757 and 80-936)

In the
Supreme Court of the United States
October Term, 1981

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC.,
Petitioner,

vs.

NEIL LEIST, PHILIP SMITH and INCOMCO,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF OF PETITIONER CLAYTON BROKERAGE CO. OF ST. LOUIS, INC.

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REPLY BRIEF OF PETITIONER CLAYTON BROKERAGE CO. OF ST. LOUIS, INC.*

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* Clayton Brokerage. Co. of St. Louis, Inc. ("Clayton"), the Petitioner herein, is a corporation. One hundred percent of the issued and outstanding stock of Clayton is owned by Garnac Grain Co., Inc. ('Garnac"). Clayton has no subsidiaries or affiliated corporations except corporations wholly owned by Clayton or Garnac and ADNAC, Inc., a corporation owned 50% by Garnac.

ARGUMENT

I.

INTRODUCTION

These consolidated cases present the question whether the Commodity Exchange Act, 7 U.S.C. §1 et seq., (the "CEA") provides private rights of action to recover damages stemming from violations of various Sections[1] of the CEA allegedly committed by futures commission merchants, contract markets and/or their officials.[2] None of the Respondents, their supporting *amici curiae* or the members of the majorities in the Courts of Appeals here and in *Curran*, contend that there is any evidence that Congress intended to create the private rights of action asserted in these cases when it enacted the statutory provisions allegedly violated by the Petitioners. In the absence of such evidence, the well settled principles of statutory construction repeatedly enunciated by this Court in recent cases[3] compel the conclusion that no unmentioned private right of action is available to remedy violations of the CEA. Nevertheless, Respondents ad-

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[1] Sections 4a, 4b, 5(d), 5a(8) or 9(b), 7 U.S.C. §§6a, 6b, 7(d), 7a(8), 13(b).

[2] A similar issue is presented in the tandem case of *Merrill Lynch, Pierce Fenner & Smith, Inc.* v. *Curran*, Docket No. 80-203.

[3] *Middlesex County Sewerage Auth.* v. *National Sea Clammers Ass'n*, ... U.S. ...., 69 L.Ed.2d 435 (1981); *California* v. *Sierra Club*, ... U.S. ...., 68 L.Ed.2d 101 (1981); *Universities Research Association, Inc.* v. *Coutu*, ... U.S. ...., 67 L.Ed.2d 662 (1981); *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11 (1979); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560 (1979); *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979).

vance two novel arguments in support of now implying private rights of action from the CEA.

First, Respondents, like the Majority in the Court of Appeals, contend that enactment of the Commodity Futures Trading Commission Act (the "CFTC Act")[4], amending the CEA, compels a different analytical approach from that taken in prior cases in which implied private rights of actions were at issue.[5] Instead of determining whether Congress ever intended to create the private rights of action at issue in these cases, Respondents urge this Court to limit its inquiry to whether Congress, in enacting the CFTC Act, intended to retract private rights of action which Congress supposedly understood the courts to have implied from the CEA.[6]

Second, Respondents argue that this Court should ignore the fact that Congress, in enacting the CFTC Act, created expressly a form of private remedy-reparations-for violations of the CEA. Although not denying the availability of reparations to them, Respondents contend that reparations are an inadequate remedy for violations of the CEA. On this ground, Respondents assert that this Court should presume that Congress intended the courts to continue to recognize the private rights of ac-

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[4] Pub.L. No. 93-463, 88 Stat. 1395 (1974).

[5] *Leist* v. *Simplot*, 638 F.2d 283, 303 (2d Cir. 1980), J.A. at 128; *Curran* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 622 F.2d 216, 232 (6th Cir. 1980); Brief of Respondents Neil Leist, Phillip Smith and Incomco 20-25 ("Leist Br."); Brief of Respondents National Super Spuds, Inc., et. al, 4-9 ("Super Spuds Br."); Brief for the Commodity Futures Trading Commission as Amicus Curiae, 8-16 ("CFTC Br.").

[6] Leist Br. at 20-25; Super Spuds Br. at 4-9 CFTC Br. at 8-16.

tion previously implied from the CEA and to create additional private rights of action based on the CEA,[7] as necessary to assure the availability of adequate remedies.

The reasoning advanced to support this unprecedented approach to implying private rights of action from a federal statute is patently fallacious and would require this Court to ignore the plain meaning of the United States Constitution.

The last decade has been marked by this Court's efforts to deliniate as clearly as possible the respective roles of Congress and the courts. The area of implied rights of action presents perhaps one of the most sensitive of all areas of tension between the legislative and judicial branches of government. In dealing with this area this Court has, with great understanding, fulfilled its constitutional duty of interpreting and not "making" law. Respondents would have the courts discard this limited role and assume the legislature's task until otherwise instructed by Congress. Such a practice, if adopted, would portend the opening of a flood gate of judicial "law making" and impose affirmative duties on Congress to correct court decisions of lower federal courts, even

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[7] Prior to the enactment of the CFTC Act, no court had ever implied a private right of action from section 4a of the CEA, no court had held a futures commission merchant (an "FCM") liable to anyone other than the FCM's customers under Section 4b of the CEA, and the only decision implying a private right of action for damages based on alleged violation of Section 9(b) of the CEA had been reversed by this Court. *See* Brief of Petitioners Heinold Commodities, Inc. and Thomson McKinnon Auchincloss Kohlmeyer Inc., 36-38. Thus, the private rights of action asserted against Clayton in this case are, if they exist, post-CFTC Act rights.

when those decisions are premised on a constitutionally infirm basis. Far more harmful than the sprouting of judicial oaks from legislative acorns,[8] a new species of analysis of legislative intent would be born. Congress will not only be charged with "making" law, it will also be charged with correcting judge made perceptions of law upon the occasion of every amendment to a statute. Such a result is repugnant to a constitution which provides "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives."[9]

II.

THE ENACTMENT OF THE COMMODITY FUTURES TRADING COMMISSION ACT DOES NOT PROVIDE A BASIS FOR IMPLYING PRIVATE RIGHTS OF ACTION FROM THE CEA.

The argument advanced in support of now implying private rights of action from the CEA is rooted in scattered excerpts from the voluminous record of the legislative proceedings which lead to the enactment of the CFTC Act. These excerpts are said to demonstrate that when Congress enacted the CFTC Act, it thought that federal courts were implying private rights of action from the CEA.[10] According to Respondents, the

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[8] *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 737 (1975).

[9] U.S. CONST. art. I, §1.

[10] As we have previously pointed out, the courts were not, in fact, implying private rights of action from the CEA. Rather, they were ostensibly applying the common law rule that the violation of a statute enacted to protect a particular class of persons is an actionable tort. Brief of Petitioner, Clayton Brokerage Co. of St. Louis, Inc. 46-47 ("Clayton Br.") Even under the then prevailing

CFTC, and the Majority below, Congress, in 1973-1974 failed to take affirmative action to halt this practice, thereby acquiescing in its continuation after the enactment of the CFTC Act. On this premise it is argued that this Court should recognize the private rights of action pursued by Respondents in order to avoid disrupting the regulatory scheme which Congress ostensibly presumed to be in effect upon enactment of the CFTC Act.[11]

A. Constitutional Principles Preclude Any Reliance on Congress' Perception of Existing Laws When Construing Those Laws.

Congress cannot legislate by inaction. Affirmative federal rights therefore cannot be created and dissolved by the varying perceptions of Congress as to the meaning of statutory provisions enacted by earlier Congresses. Aside from the unreasonable uncertainty which would be created if this were not true,[12] constitutional principles preclude adoption of such a practice.

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[10] (Continued)
practice of liberally recognizing private rights of action on the basis of violations of federal statutes, these decisions were clearly erroneous. *See Wheeldin* v. *Wheeler*, 373 U..S. 643 (1963).

[11] Although the argument is couched in terms of applying cannons of statutory construction — e.g. implied repeals are disfavored; the reenactment of a statute incorporates existing constructions of the statute — the requisite factual bases for applying these cannons of construction are not present in this case. *See* Clayton Br. 42-47.

[12] *See* discussion *infra* at 9-10.

Article I, Section 7 of the Constitution of the United States[13] prescribes the method by which Congress shall enact statutes. Each house of Congress must affirmatively pass a bill before it can become law. Once such bills have become law, it becomes the duty of the courts, not the members of a subsequent Congress, to construe the law. *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803).

While each house of Congress certainly passed the CFTC Act in 1974, no one can identify any provision of that Act which plausibly can be construed to create a private right of action akin to the private rights of action which Respondents seek to have recognized by this Court.[14] None of the statutory language from which the private rights of action asserted by Respondents theoretically derive was enacted as part of the CFTC Act. Thus, no member of Congress who voted on the CFTC Act was called upon to make a judgment, in voting on the bill, whether to enact language which was perceived to create private rights of action for violations of the CEA.

This plainly distinguishes the present case from *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979)

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[13] U.S. CONST. art. I, §7.

[14] The CFTC argues that, in fact, the jurisdictional savings clause contained in Section 201(b) of the CFTC Act can be construed to, in effect, create the private rights of action asserted by Respondents. CFTC Br. at 17-22. The argument is specious. It is a well established principle that jurisdictional provisions do not create substantive rights. *Touche Ross & Co.* v. *Redington*, 422 U.S. 560, 577 (1979). *See also Middlesex County Sewerage Auth.* v. *National Sea Clammers Ass'n*, ... U.S. ...., 69 L. Ed. 435, 447-449 (1981) Nor do they authorize the federal courts to formulate or create such rights. *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, ... U.S. ...., 68 L. Ed. 2d 500, 509 (1981).

in which this Court's decision was based, in part, on Congress' perception of the law at the time it enacted Title IX of the Education Amendments of 1972. In *Cannon* the decision was grounded on Congress' understanding of the construction which the courts had already given to statutory language similar and, in part, identical to the language which was being enacted by that Congress. *Id.* at 696-99. In this case, even if Congress had, erroneously or otherwise, perceived that when it enacted the CFTC Act the private rights of action here asserted by Respondents were implicitly provided for by the CEA, it clearly did not enact any statutory language which it viewed as creating such rights.

Whether or not Congress, in 1974, would have voted to enact statutory language creating private rights of action to remedy alleged violations of the CEA had such language been included in a bill presented to it for a vote is open to conjecture.[15] None of the bills which had been introduced as proposed versions of the CFTC Act and which contained language creating expressly the types of private remedies pursued by Respondents in these cases were voted on by Congress in 1973-1974. Whether this was due to their sponsors' perception that such bills could not pass, the lobbying efforts of opponents of private rights of action, or simply some accident of the legislative process cannot be known for certain. But the fact remains that no member of Congress in 1973-1974 has had to account to constituents for casting a vote for or against statutory language which would create by implication the private rights of action now pursued by Respondents. This fact, standing alone, pro-

[15] There is substantial evidence suggesting that Congress would not have passed such language. See discussion *infra* at 10-12.

vides a sufficient basis for refusing to imply private rights of action on the basis of the CFTC Act or its legislative history.

B. If the Perceptions of Congress Govern the Construction of a Statute No Private Rights of Action Are Now Implicit in the CEA.

Respondents argue that Congress' failure to take affirmative action to alter what it perceived to be the status quo provides an adequate legal basis for this Court making Congress' supposed perception of the status quo a legal reality. If Congressional inertia resulting from Congress' supposed perception of the law provides an adequate legal basis upon which statutory rights of action may be created, it must logically provide an equally adequate legal basis upon which statutory rights of action may be withdrawn. The mischief of such a rule of law is such that it should preclude adoption by this Court.

The legislative history of the Futures Trading Act of 1978 (the "1978 Amendments")[16] clearly demonstrates that Congress was told, when it amended the CEA in 1978, that federal courts were refusing to imply private rights of action from the CEA. Senator Huddleston, a strong supporter of implied private rights of action, clearly explained this fact to the Senate.[17] While Senator Huddleston was plainly critical of these decisions, his comments made on the floor of the Senate must be regarded as an indication of Congress' perception of the prevailing state of the law, just as surely as Congressman Poage's oft cited remarks,[18] are supposed to demonstrate

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[16] Pub.L. No. 95-405, 92 Stat. 865 (1978).

[17] 124 Cong. Rec.-Senate 10537 (1978).

[18] 119 Cong. Rec.-House 41333 (1973).

Congress' perception of the prevailing state of the law in 1973-1974.[19]

Congress took no affirmative action expressly directed at altering what it (under Respondent's arguments) is deemed to have perceived as the prevailing view of implied private rights of action under the CEA. If the argument advanced by Respondents had any legal merit, whatever implied private rights of action for violation of the CEA had been created in 1974 would have been withdrawn by the enactment of the 1978 amendments, An appellate court must apply the law as it is in effect at the time of its decision. *Cort* v. *Ash*, 422 U.S. 66, 76-77 (1975). When carried to its logical conclusion, therefore, Respondents' own argument concerning the basis for now implying private rights of action from the CEA would compel the reversal of the Court of Appeal's decision.

C. Congress Perceived That Its Creation of The Reparations Proceedings Would Eliminate The Basis For An Implied Private Right of Action Under The CEA.

Even assuming, arguendo, that Congress' perception, in 1974, of the state of the law regarding private rights of action to remedy violations of the CEA has any bearing on this case, that perception certainly does not provide a basis for now implying the private rights of action asserted by Respondents in these cases.

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[19] The Senate Committee on Agriculture and Forestry's report on the 1978 Amendments also indicates that Congress perceived, in 1978, that private rights of action were unavailable to enforce the CEA. The Report twice catalogues the remedies available for violations of the CEA and in each instance makes no reference to private rights of action for violations of the CEA. S. Rep. No. 95-850, 95th Cong., 2d Sess. 12-13, 32 (1978), *reprinted in* (1978) U.S. Code Cong. & Ad. News 2087-2166, 2101, 2120.

While the House Report on the CFTC Act or the testimony before the House and Senate committees considering the CFTC Act might have served to inform Congress that there was a body of opinion, albeit not settled, "that the failure to enforce the exchange rules is a violation of the [CEA] which will support suits by private litigants."[20] This is an insufficient basis to assume that Congress, as a whole, was aware of this body of law.[21] There is equally substantial evidence that Congress was informed that under the prevailing law applicable to implied rights of action, its enactment of statutory provisions creating expressly private remedies for violations of the CEA would preclude continued implication of additional remedies from the statute. *See Commodity Futures Trading Commission Act, Hearings Before The Senate Committee on Agriculture and Forestry on S. 2485, S. 2578, S. 2837 and H.R. 13113*, 93d Cong., 2d Sess. 737 746 ("1974 Senate Hearings") ("If you do choose to retain any such virtually unprecedented responsibility and burden [reparations proceedings] in this regulatory body, there should be explicit language in the statute that federal and state courts are still open if a complainant prefers to go to trial there.") (Statement of Roy A. Shotland, Professor of Law, Georgetown University Law Center).[22]

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[20] H. R. Rep. No. 93-975, 93rd Cong. 2d Sess. 46 (1974).

[21] *See, SEC* v. *Sloan*, 436 U.S. 103 (1978).

[22] This principle is embodied in this Court's decision in *National Railroad Passenger Corp.* v. *National Railroad Passenger Ass'n*, 414 U.S. 453 (1974), decided before either house of Congress conducted any hearings on any of the proposed versions of the CFTC Act. Even if Congress had not been advised explicitly of this principle, it must be presumed that Congress knew the law. *Cannon* v. *University of Chicago*, 441 U.S. at 696-97.

Despite Congress' charged knowledge that the courts would not imply remedies from a statute which already provided express remedies, it proceeded to amend the CEA, creating the reparations proceedings. Nowhere in the CEA, as amended, is there any language which indicates that Congress did not intend reparations to be the sole method of adjudicating[23] private claims based on alleged violations of the CEA.[24] This construction of the reparations procedures is consistent with the descriptions of reparations in both the House and the Senate.[25] It is thus clear that if Congress' perception of the law in 1974 has any bearing on the issues in this case, it compels the finding that Congress did not perceive that the judicial practice of recognizing private rights of action for violations of the CEA would survive the enactment of the CFTC Act.

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[23] Arbitration of disputes, whether or not relating to alleged violation of the CEA, was, of course, required to be available as well. *See* 7 U.S.C. §§7a(11), 20(b)(10).

[24] Any reliance on Section 2(a)(1) of the CEA to argue the contrary is clearly misplaced. The jurisdictional savings clause included in that section of the CEA serves only to limit the effect of the language of Section 2(a)(1) of the CEA which grants exclusive jurisdiction to the CFTC. *See* Clayton Br. at 36-42.

[25] *See* H.R. Rep. No. 93-975, 93d Cong., 2d Sess. 22, 83 (1974); *1974 Senate Hearings*, 194. *See also, Leist* v. *Simplot*, 638 F. 2d 283, 346, J.A. 229 (Mansfield, J., dissenting).

III.

CONGRESS HAS PRESCRIBED THE MEANS BY WHICH RESPONDENTS MAY SECURE RELIEF FOR ALLEGED VIOLATIONS OF THE CEA.

Respondents, the CFTC, and the *amici curiae* Sunnyside Eggs, Inc. ("Sunnyside") and Samuel Friedman ("Friedman")[26] all argue that this Court should imply private rights of action from the CEA because, in the absence of such rights, the remedies available for violations of the CEA would be inadequate. Not only in this assertion plainly erroneous, it is plainly irrelevant.

A. Reparations Provides A Means By Which Persons Damaged By Violations of the CEA May Recover The Full Amount of Their Damages From the Appropriate Parties.

Without exception, each of the violations of the CEA which are alleged by Respondents,[27] Sunnyside (in *Sunnyside Eggs, Inc. et al.* v. *Barry Urner Publications,* C78-1661A (N.D. Ga.)) and Friedman (in *Friedman* v. *Bache Halsey Stuart Shields, Inc., et al.* No. 80 C 111 (N.D. Ill.)) were committed or aided and abetted by a person registered or required to be registered with the CFTC pursuant to Sections 4d, 4e, 4k or 4m of the CEA, 7 U.S.C. §§ 6d, 6e, 6k, 6m. All claims arising from such violations can now be adjudicated in reparations, and, if the claims are sustained, the claimants are entitled to recover the full amount of the damages proven by them from the respondents.

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[26] Although Mr. Friedman has not filed a brief as *amicus curiae,* in this case, he has filed a brief in *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran,* Docket No. 80-203, in which he expands on certain points raised in the Leist Br. filed in these consolidated cases.

[27] Including the Respondents in Docket No. 80-203.

7 U.S.C. §18(e).[28] Given the wide ranging nature of the claims alleged, it is apparent, as we have previously pointed out, that violations of the CEA cannot, as a practical matter, occur without the involvement of at least one person registered or required to be registered under the Act.[29] Thus, any concern that the victims of violations of the CEA might be without an opportunity to recover the losses sustained as a consequence of such violations is unfounded.

The concern expressed by Respondents and the Majority in the Court of Appeals that persons such as Messrs. Simplot and Taggares, are immune from monetary liability for the damages caused by their violations of the CEA is also unfounded.

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[28] The Currans, Respondents in Docket No. 80-203, assert that reparations are unavailable to them because the violations for which they seek recovery occurred prior to the enactment of the CFTC Act. If this is true, these violations also occurred prior to the repeal of the state law savings clause in section 4c of the CEA, 7 U.S.C. §6c (1970) (amended 1974), an the concommitant preemption of state law. Thus, the Currans could have availed themselves of any state law remedy which was available, e.g., suit based on common law fraud, breach of fiduciary duty, or the like. If reparations are indeed unavailable to them, their case would be an appropriate case for the court to decline to apply the law in effect at the time of its decision, and, instead, apply the law—in this case state law—in effect at the time of the alleged wrongdoing. *Cort* v. *Ash*, 422 U.S. 66, 76-77 (1975). Their case is no different from that of any other person allegedly injured by violations of the CEA occurring prior to the enactment of the CFTC Act. The fact that Congress chose not to make reparations available on a retroactive basis, while making the Currans' remedy somewhat different from that available now, does not mean that Currans are wholly without a remedy.

[29] Clayton Br. 21, n. 19.

Although the reparations proceedings are available only for violations of the CEA which involve a person registered or required to be registered with the CFTC, Section 14 of the CEA[30] does not, in terms, limit the possible respondents in such a proceeding to persons who are registered or required to be registered with the CFTC under the CEA. Section 13(a) of the CEA[31] provides that:

> *Any person* who commits, or who willfully aids, abets, counsels, commands, induces, or procures the commission of, a violation of any of the provisions of this Act, or any of the rules, regulations or orders issued pursuant to this Act, or who acts in combination or concert with any other person in any such violation, *or who willfully causes an act to be done or omitted which if directly performed or omitted by him or another* would be a violation of the provisions of this Act or any of such rules, regulations, or orders *may be held responsible in administrative proceedings under this Act for such violation as a principal.* (emphasis added)

Reparations are clearly "administrative proceedings under this Act." Thus, Section 13(a) of the CEA clearly permits the joinder of unregistered persons as respondents in a reparations proceeding.

Plainly, reparations afford Respondents with an opportunity for complete relief for violations of the CEA. Thus, even if this Court were to disregard the constitutional principles which compel the mode of analysis now utilized to determine the availability of an implied private right of action and invoke the principle of *ubi jus, ibi remedium*, no private right of action would

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[30] 7 U.S.C. §18.

[31] 7 U.S.C. §13c.

be implied from the CEA under the circumstances of these cases, since the statute, as amended in 1974, expressly provides a remedy—reparations.

The procedural shortcomings of reparations which the Leist Respondents and Friedman contend are indicative of the inadequacy of the relief available in reparations are not unique to reparations. Just as a commodities trader may find himself litigating an alleged CEA claim in reparations while defending in state court against a suit brought by his futures commission merchant to recover a deficit in his account, a securities trader sued in state court by his broker may be forced to litigate his claims against his broker in another forum. The securities trader, for example, can only pursue a claim based on an alleged violation of the Securities Exchange Act of 1934, 15 U.S.C. §78a et seq, in federal court. 15 U.S.C. §78aa. Unless the broker's suit is removable to federal court on the grounds of diversity jurisdiction, the securities trader must litigate his claim in federal court while defending the other suit in state court.[11] There is a substantial likelihood that these proceedings, like a reparations proceeding and a futures commission merchant's suit on a customer's deficit, will proceed at different rates of speed.

Likewise, the possibility that a given claimant may not, under all circumstances, be able to pursue all of his claims against a particular defendant or group of defendants in a single forum, while perhaps inconvenient, is not unusual. Whenever a court invokes the doctrine of primary jurisdiction as to some, but not all of the

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[11] *Cf. Rath Packing Co.* v. *Becker*, 530 F.2d 1295 (9th Cir.) *aff'd*, 430 U.S. 519 (1975) (holding a counterclaim to be an inadequate grounds for removal.)

claims asserted in a given case, it effectively compels litigation of the claims in separate forums. *See e.g. Ricci* v. *Chicago Mercantile Exchange,* 409 U.S. 289 (1973) (directing court to defer to the Commodity Exchange Commission insofar as the case involved alleged violations of the CEA, but permitting the court to adjudicate the antitrust claims asserted.)

B. It Is The Task of Congress, Not The Task of the Court, To Define The Remedies For Conduct Deemed Wrongful Under Congressionally Enacted Statutes.

Whether or not the statutorily specified remedies for violation of the CEA are adequate or inadequate is irrelevant to the decision in this case. Even the possibility that some alleged violators of the CEA may escape liability to the victims of the violations for their wrongdoing is not a sufficient reason for this court to imply a private right of action from the CEA. *See Texas Industries, Inc.* v. *Radcliff Materials, Inc.,* ..... U.S. ....., 68 L.Ed.2d 500, 507, 509; *Northwest Airlines, Inc.* v. *Transport Workers Union of America, AFL-CIO,* ..... U.S. ....., 67 L.Ed.2d 750, 765-66 (1981). As this Court has often pointed out:

> In our constitutional system the commitment to the separation of powers is too fundamental for us to preempt congressional action by judicially decreeing what accords with 'common sense and the public weal.' Our Constitution vests such responsibilities in the political branches. TVA v. Hill, 437 U.S. 153, 194 (1978).

See also Texas Industries, Inc. v. *Radcliff Materials, Inc.,*

IV.

NO PRIVATE RIGHT OF ACTION TO RECOVER DAMAGES FOR A VIOLATION OF THE CEA HAS EVER EXISTED.

In the final analysis, all of the arguments advanced in this Court in support of now implying private rights of action from the CEA depend on the existence of private rights of action under the CEA prior to 1974. No one seriously contends, however, that any act of any Congress prior to the Congress of 1973-1974 explicitly or implicitly created any private right of action to recover damages for a violation of the CEA. In the absence of such an act of Congress, no such private right of action came into existence.

No decision or line of decisions rendered by the federal courts, not even a decision by this Court, could create such private rights of action. That task is left to Congress. Thus, the rendition of decisions upholding the availability of private rights of actions to recover damages for violations of the CEA exceeds the authority of the federal courts and usurps the prerogative of the legislative branch. The unconstitutionality of this practice is clear, and its abandonment compelled. *Erie R.* v. *Tompkins*, 304 U.S. 64, 77-78 (1938).

CONCLUSION

For the foregoing reasons, Petitioner Clayton Brokerage Co. of St. Louis, Inc. respectfully requests that this Court vacate the Judgment of the Court of Appeals and reinstate the Judgment of the District Court.

Respectfully submitted,

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